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Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- Australia --

14 June 2010

The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

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1. Introduction

1. This submission focuses on the role of standards setting, the many objectives that standards setting seeks to achieve, and the consequent impacts on competition. The submission notes that while standards can be pro-competitive or anticompetitive, concerns regarding the anticompetitive effects must be considered within the context of the other objectives that standards may be designed to achieve, and the costs and benefits weighed accordingly. A number of examples from Australia's experience are provided to illustrate this point. The submission concludes by considering some of the institutional frameworks involved in standards setting in Australia.

2. Example: phone number portability

2. Following the release of a discussion paper by the Australian Competition and Consumer Commission (ACCC) in 1999, the Australian Government made regulations in 2001 under the *Telecommunications Act 1997* to set an industry standard to increase mobile phone number portability. It was the third implementation of number portability in Australia. Local number phone number portability came into full effect at the start of 2000, and portability for specialist phone numbers was introduced in November 2000.

3. Phone number portability ensures that telephone customers can retain their existing phone number(s) when changing their carriage service provider. Previously, consumers found switching carriers while maintaining their phone numbers extremely difficult, which therefore reduced the attractiveness of switching, to the advantage of incumbent carriers. Phone number portability allows consumers to choose between competing carriage service providers based on price, quality, type of service and (for mobile phone users) coverage without the inconvenience and expense of having to take a new number when moving between providers. Phone number portability also eliminates the need for callers to contact directory services to find someone's new number or for people to miss calls as callers continue to dial the old number.

4. Thus, the setting of standards by the Australian Government in respect of phone number portability has reduced barriers to entry to the telecommunications market, making it easier for new entrants to attract customers from incumbent providers.

5. However, as noted above standards setting can be prone to anticompetitive behaviour, particularly in the absence of government coordination, because standards are often set by groups that include actual and potential competitors. Standards can exclude certain technologies and alter incentives to invest in new intellectual property or product development. Standards setting processes may also provide firms with the ability to alter market conditions to their advantage by 'hijacking' those processes by, for example, erecting artificial barriers to entry. The mere meeting of actual and potential competitors to discuss the setting of standards may represent its own risks.

6. While standards setting may in some cases be vulnerable to exploitation by those with the ability and incentive to use the process for anticompetitive purposes, at other times standards setting may unintentionally result in anticompetitive consequences. Just like any well intentioned regulation, the formulation of rules to achieve social outcomes or other welfare objectives may have the perverse result that markets are altered in ways that restrict competition – an outcome that may not have been obvious to, or taken into account by, the decision makers at the time.

3. Example: food standards

7. In Australia, the two key agencies that regulate food are Food Standards Australia and New Zealand (FSANZ) and the ACCC.

8. FSANZ is the regulatory authority that develops and reviews food standards, including labelling requirements, for food sold or prepared for sale in Australia and New Zealand, and food imported into Australia and New Zealand. FSANZ is responsible for developing and administering the Australia New Zealand Food Standards Code (the Code), a collection of individual food standards. However, FSANZ does not enforce the Code.

9. In 2004, the ACCC and FSANZ signed a memorandum of understanding to facilitate cooperation and coordination between the two agencies, in relation to areas of overlap between the Australia New Zealand Food Standards Code and the *Trade Practices Act 1974* (TPA), particularly in the area of false and misleading labelling.

10. The *Food Standards Australia New Zealand Act 1991* (FSANZ Act) outlines FSANZ's objectives (in descending priority) as being the:

- protection of public health and safety;
- provision of adequate information about food to enable consumers to make informed choices; and
- prevention of misleading and deceptive conduct.

11. The food standards in the Code are given legal effect by state, territory and New Zealand legislation. In Australia, state and territory health departments are responsible for enforcing and interpreting the Code. The Code's requirements must also be read in conjunction with the relevant local food legislation and the TPA.

12. The ACCC is the independent statutory authority that enforces the prohibitions contained within the TPA. As noted in the ACCC's Memorandum of Understanding with FSANZ, the ACCC's key role in relation to food standards and food labelling relates to the enforcement of the TPA's provisions relating to misleading and deceptive conduct (Part IV of the TPA).

13. However, the ACCC's role in relation to Australia's food standards does not extend to advice on whether Australian and New Zealand food labelling standards may reduce competition in particular markets.

3.1 *Interaction between standards setting and competition policy in food labelling*

14. An Australian food retailer recently reported that compliance with Australian food labelling requirements (in this case relating to peanut butter, a spread) cost 50 cents per jar due to the need to re-label all jars imported into Australia. The retailer advised that this food labelling requirement had therefore altered the actual and potential threat of import competition to the domestic Australian peanut butter market, increasing prices for consumers as a result.

15. While food labelling may reduce competition in certain circumstances, as highlighted by the example above, these losses to society must be weighed against other dividends from the regulations, namely FSANZ's objectives of: protection of public health and safety; provision of adequate information

about food to enable consumers to make informed choices; and the prevention of misleading and deceptive conduct.

16. However, achieving the appropriate policy balance is often difficult and can be influenced by special interest groups, particularly those with the ability and incentive to manipulate standards setting processes for anticompetitive purposes. Therefore, it is important to ensure that the appropriate institutional arrangements are in place to minimise the risk of regulatory capture, particularly in the case of government-sanctioned standards setting.

17. In other circumstances, food products imported into Australia may be labelled differently in their home markets under a standard which achieves the same objectives as Australia's. In these circumstances it is important to ensure there is some level of international harmonisation, so as not to unduly restrict competition or trade. Some of these issues are currently being considered by a broad review of food labelling law and policy in Australia.

3.2 *Review of food labelling law and policy in Australia*

18. The Australia and New Zealand Food Regulation Ministerial Council (the Ministerial Council)¹ has commissioned an independent comprehensive review of food labelling law and policy. On 5 March 2010, the Food Labelling Law and Policy Review Panel (the Review) released an issues consultation paper, which notes the importance of ensuring domestic labelling requirements do not create unnecessary barriers to trade,² and further stated that:

19. 'The crux of this Review will be to address the tensions between fair and competitive trade in the market, the minimisation of the regulatory burden for business, the securing of government objectives in food labelling and the needs of consumers in order to make informed choices.'³

20. The final report of the Review is expected to be provided to the Ministerial Council in December 2010.

21. The peanut butter jar labelling example above and this review process both highlight the need to consider these issues beyond merely a domestic context as these issues often have an international aspect that can influence competitive outcomes at both the domestic and international level. This is recognised by subparagraph 18(2)(b) of the Food Standards Australia and New Zealand Act which provides that one of the factors which FSANZ must have regard to when developing or reviewing food regulatory measures is: 'the promotion of consistency between domestic and international food standards'.

22. While harmonisation of standards across borders may not always be possible or desirable, it is important to at least consider these issues in this broader context.

4. Standards setting and competition in Australia

23. Key avenues for the government consideration of the competition effects of standards setting in Australia include assessment of the regulatory impacts of government regulations by the Office of Best Practice Regulation (OBPR)⁴ and the involvement of the ACCC in industry 'codes' or standards.

¹ The Australia and New Zealand Food Regulation Ministerial Council is made up of Health Ministers from most Australian States and Territories, the Australian Government and New Zealand as well as other Ministers from related portfolios (such as Consumer Affairs).

² Food Labelling Law and Policy Review, Issues consultation paper, page 1.

³ Ibid page 2.

24. The OBPR promotes the Australian Government's objective of improving the effectiveness and efficiency of regulation through assessment of regulatory impacts, and ensuring best practice regulatory principles are followed in the development of new regulations. The OBPR's role applies broadly to government policy and includes government-made regulations such as standards setting. The OBPR's analysis requires that decision makers consider the impact on competition of the regulations they are making, including whether the regulations will change the ability or incentives of businesses to compete, and the impact on consumers.

25. The ACCC's role in relation to standards setting has evolved over time and ranges from providing guidance to industry associations involved in developing voluntary standards, to the administration of regulated mandatory industry standards (or 'codes of conduct').

26. In respect of voluntary codes of conduct, the ACCC plays a particularly important role. As noted above and observed by the ACCC in the past, voluntary codes of conduct are more likely to be open to anticompetitive abuse, as it is the competitors who are creating the regulations. The ACCC has assisted the development of 42 voluntary industry standards. The ACCC's role includes the following:

- providing feedback to industry in the standards development phase;
- providing feedback on TPA issues within the proposed standard;
- granting notification or authorisation⁵ relating to anticompetitive sections of an industry standard where appropriate; and
- participating as an observer on standards administration committees.

27. The ACCC aims to ensure that the voluntary codes it assists with are pro-competitive by:

- providing publications that alert industry on avoiding anticompetitive implications, such as the ACCC's 'Guidelines to developing effective voluntary industry codes of conduct';
- cautioning industry to be mindful during the development phase of the standard to avoid anticompetitive behaviour during meetings of actual or potential competitors;
- assisting industry with the development of the standard, including encouraging industry to obtain legal advice to ensure the standard does not contain any anticompetitive provisions;
- encouraging industry to include a comment in the standard advising that the standard does not exclude signatories from their obligations under the TPA; and
- advising industry to apply to the ACCC for authorisation of anticompetitive elements of the standards where necessary.

28. There is no requirement for those seeking to establish an industry standard to approach the ACCC. However, where voluntary standards involve a possible breach of the restrictive trade provisions of the TPA, authorisation must be sought from the ACCC for the standard.

⁴ The OBPR is an agency within the Australian Government Department of Finance and Deregulation.

⁵ The ACCC may authorise businesses to engage in anticompetitive arrangements or conduct when it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment. The authorisation provides immunity from legal action under the TPA.

29. In respect of mandatory industry standards, these can be made by regulations (subject to assessment by the OBPR) under Part IVB of the TPA, and are enforced by the ACCC. Section 51AD of the TPA establishes that a corporation must not, in trade or commerce, contravene an applicable industry code.⁶

- A code is an ‘applicable industry code’ when it has been declared by regulations under section 51AE to be either a mandatory or a voluntary industry code.
- A voluntary code is an applicable industry code only for those corporations that have consented to be bound by the voluntary code. The regulations may specify the method by which a corporation agrees to be bound.

30. Section 51AD makes a breach of an industry code a breach of the TPA. The relevant provisions of Part VI of the TPA allow for civil remedies (such as injunctions and damages) for these breaches, but not penalties. Currently there are four mandatory standards under the TPA: the Franchising Code of Conduct, the Oilcode, the Horticulture Code of Conduct and the Unit Pricing Code of Conduct.

5. Conclusion

31. Australia does not have a central authority that deals with standards setting policy and issues. However, there are a range of minimum checks and balances on standards setting to ensure that impacts on competition are either minimised or justified. The OBPR plays a role in ensuring that decision makers consider the impact on competition that new regulations and legislation create, including in relation to mandatory industry standards under the TPA. In addition, all standards are subject to the restrictive trade provisions of the TPA, which applies broadly to the economy, unless they are authorised by the ACCC.

32. In relation to voluntary standards, where anticompetitive abuse may be most likely, industry participants have a strong incentive to consult with the ACCC on the design of their proposed industry standard. This ensures that if necessary, industry participants can seek authorisation from the ACCC for any anticompetitive provisions in the standard, in order to avoid potential breaches of the restrictive trade provisions of the TPA.

33. This paper has discussed some of the costs industry standards can have on competition in a market. However, as with any government intervention in markets, there may be unintentional anticompetitive effects and such costs must be weighed against the benefits associated with the other objectives that standards may be designed to achieve.

⁶ The TPA typically refers to ‘industry codes’ as opposed to ‘industry standards’, however the terms can be used interchangeably.